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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-169

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY RABBIOSI, FELIX W. WHITE, JR., and DIANA LAPOINTE, Individually and on Behalf of All Other Similarly Situated Persons, *Petitioners,*

v.

WILLIAM A. PETERS, INDIVIDUALLY AND AS NEBRASKA STATE TAX COMMISSIONER AND THE NEBRASKA DEPARTMENT OF REVENUE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY [illegible]BBIOSI, FELIX W. WHITE, JR., and DIANA LAPOINTE, Individually and on Behalf of All Other Similarly Situated Persons, *Petitioners,*

v.

WILLIAM A. PETERS, INDIVIDUALLY AND AS NEBRASKA STATE TAX COMMISSIONER AND THE NEBRASKA DEPARTMENT OF REVENUE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Omaha Tribe of Indians, the Santee Sioux Tribe of Indians, the Winnebago Tribe of Indians, and the individual tribal members petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 1a-7a) is not yet reported. The district court's opinion App. pp. 8a-17a) is reported at 382 F. Supp. 421 (D. Neb. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did Congress in Public Law 83-280, 67 Stat. 588, 28 U.S.C. § 1360, authorize the State of Nebraska to impose a state income tax on income earned by Indians working and residing on federally recognized reservations located in the State of Nebraska.

STATUTE INVOLVED

28 U.S.C. § 1360:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.
>
> • • •
>
> Nebraska. . . . All Indian country within the State.
>
> • • •
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT OF THE CASE

The Omaha Tribe of Indians, the Santee Sioux Tribe of Indians, and the Winnebago Tribe of Indians are three federally recognized Indian tribes occupying reservations within the State of Nebraska. Each tribe entered into a series of treaties with the United States whereby the tribes ceded vast portions of land in exchange for their existing reservations. Each of the tribes has been established in accordance with the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and has adopted an appropriate constitution and by-laws in accordance with federal law. The individual Indian petitioners are enrolled members of the tribes. Each resides within the boundaries of the Indian reservations and each earns his or her income from activities taking place solely within the three reservations. The respondents are the State Tax Commissioner of the State of Nebraska and the Nebraska Department of Revenue. Respondents are charged with administering the Nebraska state income tax laws.

The Indian tribes sued the State Tax Commissioner of the State of Nebraska on February 4, 1974, claiming that the State of Nebraska has no authority to tax Indian income earned within the Nebraska Indian reservations. The tribes and the individual members asserted federal court jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1343(3), and 28 U.S.C. § 1362. The Indians sought a declaration that the immunity for Indian income

from state taxation confirmed in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), applied to Nebraska reservation Indians. Nebraska argued that because it has been authorized by Congress in Public Law 83-280, 67 Stat. 588, 28 U.S.C. § 1360, 18 U.S.C. § 1162, to exercise civil and criminal jurisdiction over Nebraska reservations, Nebraska Indians are not entitled to the Indian tax immunity secured in *McClanahan, supra.*

The district court ruled in favor of the State of Nebraska and concluded that as a result of the enactment of Public Law 280, the State of Nebraska had been authorized to impose its income tax laws against Indian income earned within the boundaries of Nebraska Indian reservations. The Nebraska Indians appealed pursuant to 28 U.S.C. § 1291 to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the district court's opinion and ruled that Public Law 280 constituted a broad congressional grant of state taxing power over reservation Indians.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO RESOLVE AN ISSUE OF GREAT IMPORTANCE TO AMERICAN INDIAN TRIBES WHICH WAS EXPRESSLY RESERVED BY THIS COURT IN McCLANAHAN v. ARIZONA STATE TAX COMMISSION.

In 1973 this Court decided a landmark case in Indian law, *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973). In *McClanahan,* this Court reaffirmed the unique legal status of reservation Indians, and concluded that Indian income earned within the boundaries of the Navajo Indian Reservation was immune from income taxes imposed by the State of Arizona. The importance of the decision in *McClanahan* lies in its declaration that Indian tribes exist as separate entities possessing attributes of sovereignty that makes them legally distinct from the states in which they are located, whose rights and privileges are defined solely through congressional action undertaken pursuant to Article 1, Section 8, Clause 3 of the United States Constitution.

In *McClanahan,* this Court expressly reserved the issue of whether the Indian tax immunity from state taxation would be applicable in a state which had assumed civil and criminal jurisdiction pursuant to Public Law 280; 411 U.S. at 178, n.19.

Although this Court did not determine the scope of state civil jurisdiction granted under Public Law 280, it did establish the framework for determining whether a given act of Congress can be deemed to have granted the states taxing authority over reservation Indians. Thus, in a companion case to *McClanahan, Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), this Court observed:

> . . . [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148.

Furthermore, in *McClanahan* this Court spelled out the characteristics a congressional cession of jurisdiction or other authorizing statute must have in order to constitute a grant of new state taxing power:

> . . . Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.

411 U.S. at 177. (Footnote omitted.)

Petitioners contend that neither the Court of Appeals nor the district court measured the scope of Public Law 280

using the special standards required to establish state taxing power over reservation Indians, so recently delineated by this Court in *McClanahan* and *Mescalero*. Indeed, the Court of Appeals summarily disposed of this important issue, expressly reserved by this Court, in two pages, and gave no consideration whatever to the special criteria required to sustain state taxing power over reservation Indians. As a result, over one hundred Indian tribes in the thirteen states which have assumed jurisdiction under Public Law 280 are being treated as if their members were no longer Indians by state tax administrators who are intent on maximizing state taxing power until this Court decides this reserved and yet unresolved Public Law 280 issue.

II. THE COURT OF APPEALS' ANALYSIS OF PUBLIC LAW 280 IS FUNDAMENTALLY INCONSISTENT WITH THE INTERPRETATION GIVEN THE STATUTE BY THIS COURT.

The Petitioners find the Court of Appeals' decision to be not only fundamentally in conflict with the rulings in *McClanahan* and *Mescalero* establishing the test for authorizing state taxation of reservation Indians, but also to be inconsistent with this Court's construction of the purpose and scope of Public Law 280 found in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971); and *Warren Trading Post* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965). In fact, the Court of Appeals failed to even consider this Court's decisions interpreting Public Law 280, and in addition made no effort to consider the legislative history of the Act. Rather the Court of Appeals, relying on an erroneous assumption that the purpose of Public Law 280 was to terminate the Indians' special federal status, summarily concluded that because the proviso (paragraph (b)) preserved only trust property rights, that the conferral (paragraph (a)) necessarily must be read to subject the Indians to all state laws, including all state tax laws. In effect, the Court of Appeals ruled that with the passage

of the Act, Public Law 280 Indians became "terminated" Indians except for their trust property rights. A brief survey of the language and legislative history of the statute indicates, to the contrary, that Congress was intent on conferring to the states a limited authority—namely the power to resolve reservation conflicts in state courts. There is no indication of a congressional plan to utilize the statute to subject reservation Indians to the myriad of state taxes levied against non-Indians.[1]

A. There Is Nothing in the Language of Public Law 280 Which Indicates that It Was Intended To Confer on the States the Power To Tax Reservation Indians.

Public Law 280 is entitled "An Act [t]o confer jurisdiction . . . [on certain states] with respect to criminal offenses *and civil causes of action* committed or arising on Indian reservations within such States . . ." (Emphasis supplied.) As to civil jurisdiction, the Act provides that a named state shall have "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . ."

There is nothing in this language which refers expressly to taxing authority or revenue raising power. On its face the law appears designed to give state courts the power to

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[1] Moreover, where the power to tax is involved in the construction of a statute, this Court has traditionally required a careful scrutiny of any conferral language to guard against taxation not clearly expressed. Treat v. White, 181 U.S. 264 (1901); Gould v. Gould, 245 U.S. 151 (1917); and Crooks v. Harrelson, 282 U.S. 55 (1930).

hear civil suits regarding causes of action that arise on reservations and to declare which laws shall apply in such suits. The statute provides that general state laws applicable to private persons and private property shall govern the relationship arising among people on Indian reservations.

Because the words of the Act do not expressly mention tax laws, a power to tax must necessarily be implied from the statute's grant of general civil jurisdiction. Inferring taxing authority over Indians in this manner, however, does violence to the strict "tax jurisdiction" standard referred to in *McClanahan* and *Mescalero*. It is also inconsistent with the pattern of congressional acts which have provided the states with new taxing powers.[2]

Furthermore, inferring special taxing powers from the general conferral language is particularly difficult to justify in this situation because the very same Congress which enacted Public Law 280 also passed a series of statutes terminating the Indian status and reservations of the Klamath, Ute, Western Oregon, Paiute, Wyandotte, Menominee, and Ponca. In these acts providing for termination of the tribes and distribution of tribal property, Congress provided *both* that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens" (25 U.S.C. §§ 564q, 677v, 703, 757, 803, 899, 980), and that "such

[2] In a number of statutes creating national recreational areas out of lands previously under mixed federal and state jurisdiction, Congress granted separately a general authority for the states to assert civil and criminal jurisdiction and a special authority for the states to impose state taxes. *See* 16 U.S.C. § 16n-6, 16 U.S.C. §§ 459(i)(6), 460(u)(8), 460(z)(12). Similarly in the Buck Act, 4 U.S.C. §§ 104-110, 61 Stat. 641, Congress expressly granted the states the power to impose gasoline taxes on Indian reservations by providing the states with a special taxing authority, and not simply with a grant of general civil jurisdiction.

property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians. . . ." (25 U.S.C. §§ 564j, 677p, 699, 749, 798, 898, 978.) This Court in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968) has instructed that Public Law 280 and the coincident termination legislation cited above must be read *in pari materia*. In *Menominee* this Court put Public Law 280 side-by-side with the Menominee Termination Act and found that the proviso in Public Law 280 preserved implied tribal hunting and fishing treaty rights. In this case when Public Law 280 is read side-by-side with the termination acts, which by their very terms extinguished all aspects of federal Indian status, subjected the terminated Indians to the general laws of the states, and *expressly* exposed the terminated Indians to state taxation, it becomes apparent that the grant of civil jurisdiction in Public Law 280 dealt solely with resolving private civil disputes, and had nothing to do with authorizing new state taxing power.

B. The Phrase "Civil Laws of General Application" Found in Public Law 280 Was Designed To Identify What Laws Would Apply in the Resolution of Civil Disputes Under the New State Jurisdiction.

Congress utilized the phrase "civil laws . . . of general application to private persons or private property" not to authorize state taxation, but rather to clarify what laws would apply once the state civil processes were invoked. The phrase "civil laws" was inserted after the conferral of civil jurisdiction to make it clear that Indians and non-Indians could rely on state "civil laws . . . of general application to private persons or private property" when they invoked the jurisdiction of state courts.

Congress' concern for clarifying what might be called the "choice of law" question is further demonstrated by the inclusion in Public Law 280 of paragraph (c) which provides that the parties could look to tribal laws not in-

consistent with state civil laws to resolve their conflicts in the state court proceedings. 28 U.S.C. § 1360(c).

The legislative history of Public Law 280 supports this construction of the statute. Public Law 280 was designed as a grant of authority to the states to assist in the resolution of civil and criminal disputes involving Indians. The House Report on H.R. 1063, which became Public Law 280, speaks of the bill as part of a series of measures withdrawing federal responsibility for Indians, but makes it clear that Public Law 280 itself was considered a more modest solution to the specific problems of inadequate law enforcement and non-existent judicial forums for resolving civil conflicts in Indian country. *See* H. Rep. No. 848, 83rd Cong., 1st Sess.; S. Rep. No. 699, 83rd Cong., 1st Sess. Tribal courts could not provide a forum for resolving the increasing number of civil disputes arising among Indians and non-Indians residing on or doing business on the reservations. On some reservations an Indian involved in an automobile accident or seeking a divorce or desiring to enforce a contract had no forum from which to obtain a resolution of his problems. The tribal court systems were simply inadequate. So Congress in Public Law 280 allowed Indians to go to state courts and provided them with a ready-made body of state law to look to in resolving their civil disputes. Thus, Congress intended "civil laws . . . of general application" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent and similar matters, but would not include laws declaring or implementing the states' sovereign powers, such as the unique power to raise revenue. The latter are not within the normal meaning of "private" laws.

This reading of Public Law 280 — that Congress inserted the phrase "civil laws" to clarify the role of state

and tribal laws in civil disputes which occurred once jurisdiction passed to the state — is supported by this Court's construction of Public Law 280 in *Kennerly* v. *District of Montana,* 400 U.S. 423 (1971). There this Court referred to Public Law 280 as an "extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country" and to certain 1968 amendments as "a new regulatory scheme for the extension of state civil and criminal jurisdiction to litigation involving Indians arising in Indian country." 400 U.S. at 428. It is also in line with the construction given Public Law 280 in *Warren Trading Post* v. *Arizona State Tax Commission,* 380 U.S. 685, 687, n.3 (1965), where this Court stated:

> Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are *specifically* authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations . . . 18 U.S.C. § 1162 (1958 ed.) and 28 U.S.C. § 1360 (1958 ed.) (respectively granting certain states criminal and civil jurisdiction over offenses and *causes of action* involving Indians within specified Indian reservations). (Emphasis supplied.)

This footnote provides considerable force to petitioners' argument that state taxing authority can only be granted by an act of Congress whose language and purpose show an intention to specifically grant such power. As noted by this Court, the entire purpose for enacting Public Law 280 was to shift to the states the governmental responsibility for enforcing the criminal laws and resolving civil disputes on Indian reservations. There is no indication in the words of the statute or in its legislative history that special federal rights accorded reservation Indian status such as the immunity from state taxation were to be extinguished.

C. In Public Law 280 Congress Included a Broad Proviso To Assure that Unique Federal Rights Accorded Reservation Indian Status, Such as the Immunity from State Taxation, Would Not Be Affected by the Conferral of Civil and Criminal Jurisdiction.

Each of the grants of civil and criminal jurisdiction in Public Law 280 is followed by an identical proviso protecting trust property from alienation, taxation or state regulation inconsistent with any federal treaty, agreement, statute or regulation. The failure of Congress to include in the proviso any reference to taxes other than those associated with trust property, occurred in part because the states themselves had emphasized the Indian tax immunity for property held in trust as reason why they should receive a federal subsidy as a *quid pro quo* for assuming criminal and civil judisdiction.[3] Moreover, the failure of Congress to specify non-trust property tax immunities can be explained in part by the fact that at the time of the enactment of Public Law 280 in 1953, neither the states nor Congress nor indeed this Court had begun to explore fully the scope of the Indian tax immunity not tied to trust property.[4] An examination of the significant Indian cases affecting income, sales, and tribal or business activities on reservations not related to Indian trust property reveals

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[3] Transcript of Hearings on H.R. 1063 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (1953). These hearings were not published. A transcript was produced by the United States during the briefing of Tonasket v. State of Washington, 411 U.S. 451 (1973), a companion case to *McClanahan, supra*. A copy of that portion of the transcript which refers to the tax status of Indians is included in the Appendix to this Petition (App. pp. 27a-28a).

[4] Indeed, the important Supreme Court cases dealing with Indian tax immunities decided prior to 1953 involved only trust property. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); United States v. Rickert, 188 U.S. 432 (1903); and Choate v. Trapp, 224 U.S. 665 (1912).

that *all* were litigated and decided *after* the enactment of Public Law 280. *Squire* v. *Capoeman*, 351 U.S. 1 (1956) [income derived from allotment is immune from federal income taxes]; *Williams* v. *Lee*, 358 U.S. 217 (1959) [the application of state laws may not interfere with tribal sovereignty]; *Warren Trading Post* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965) [states may not tax Indian businesses because Congress has occupied the field through enactment of the federal trading statutes, 25 U.S.C. § 261, *et seq.*]; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973) [states may not tax Indian income earned on an Indian reservation absent specific congressional authorization]; and *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 154 (1973) [Indian tax exemptions exist for off-reservation activities only if secured by a federal statute].

Given the scope of Indian tax immunities existing at the time of the enactment of Public Law 280, the proviso preserving the status of trust property can be viewed either (a) as a congressional expression confirming the special protection for trust property secured by preexisting opinions of this Court, and by longstanding congressional legislation, i.e. The General Allotment Act, 24 Stat. 388, or (b) as a congressional determination to carve out and preserve from the conferral of general taxing jurisdiction only those tax immunities accorded reservation Indian status which were related to trust property. The first alternative is consistent with this Court's interpretation of Public Law 280 as being directed toward resolving civil causes of action taking place on reservations for its assumes the conferral provision was not designed to grant comprehensive state taxation. The first alternative simply confirms that Congress was concerned with preserving from state civil jurisdiction what it thought were the rights, privileges, immunities, and benefits enjoyed by reservation Indians in furtherance of federal policies.

On the other hand, the second alternative, adopted by the lower courts, requires that the conferral section be construed to be an open-ended, but unstated, grant of state taxing authority. The second alternative also requires imputing to Congress knowledge about the full scope of the Indian tax immunity twenty years before this Court rendered its judgment in *McClanahan*. Finally, reading the proviso as a congressional mandate to treat Public Law 280 Indians differently from all other federally recognized Indians by limiting their tax immunity to trust property, requires imputing to Congress the intent and the action of silently terminating an important right accorded reservation Indians without expressly informing the Indians. We believe such a reading is inconsistent with how this Court has interpreted federal acts enacted to benefit Indians. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

This reading of the proviso to Public Law 280 is supported by the limited legislative history relating to the impact of the statute on state taxation. Indeed, there is no indication in the committee reports or debates on the bill that Congress intended the Act's conferral of civil and criminal jurisdiction to enlarge the states' power to tax Indians, although if this were intended it would have been a matter of sufficient importance to evoke discussion within Congress and opposition from the tribes. To the contrary, the Act's legislative history shows that Congress intended not to subsidize the states for exercising criminal and civil jurisdiction within reservations, either by federal payment or by authorizing increased taxation of Indians.[5]

[5] The following colloquy taken from the Subcommittee Hearings on H.R. 1063 and reproduced in its entirety in the Appendix is especially revealing:

> Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.
>
> Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.

See App. p. 28a. Subsequent congressional hearings have reaffirmed that Public Law 280 was not designed to expand the states' taxing power. *See* Hearings on H.R. 15419 and Related Bills before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 2d Sess. 27 (1968). Furthermore, the prohibition against trust property encumbrances in Public Law 280 suggests a congressional intent not to impose state tax laws which are generally enforced by liens against the taxpayer's property. 28 U.S.C. § 1360(b).

III. THE CONFUSION SURROUNDING THE GRANT OF CIVIL JURISDICTION IN PUBLIC LAW 280 STATES HAS RESULTED IN A CONCENTRATED PUSH BY STATE TAX ADMINISTRATORS TO IMPOSE COMPREHENSIVE STATE TAXATION ON RESERVATION INDIANS.

Over one hundred Indian tribes and bands, with a tribal membership of nearly one hundred and fifty thousand Indians located in the thirteen states which have assumed civil and criminal jurisdiction pursuant to Public Law 280, are finding that with the passage of each year, Public Law 280 states are imposing an ever greater number of state revenue laws to cover reservation property, reservation business activities and reservation income.[6] What began as a congressional plan to improve the resolution of civil conflicts for reservation Indians has become an open-ended invita-

[6] Undermanned Indians are currently undertaking major tax litigation in at least three Public Law 280 states besides Nebraska: resisting income taxation in Wisconsin, Wildcat, et al. v. Adamany, et al., Civ. No. 74-C-227 (W.D. Wisc.); excise, use and sales taxes in Washington, Quileute Indian Tribe, et al. v. State of Washington, Civ. No. 74-7619 (W.D. Wash.); and personal property taxation in Minnesota, Bryan v. Itasca County, Minnesota, — Minn. —, 228 N.W.2d 249 (1975), petition for certiorari filed, July 3, 1975.

tion for the exercise of state sovereignty, especially state revenue powers.

The Indians, the United States, and indeed Congress understood that the conferral of civil and criminal jurisdiction under Public Law 280 did not constitute a termination statute. Federal rights accorded reservation Indians were preserved in Public Law 280 while they were expressly extinguished in the termination acts. *See Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).[7] This Court has often reviewed cases to make certain that treaties, agreements and federal statutes are interpreted as the Indians understood them. *Antoine* v. *Washington*, 417 U.S. 966 (1975); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630 (1970); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943); *Jones* v. *Meehan*, 175 U.S. 1 (1899); *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938); *Marlin* v. *LeWallen*, 276 U.S. 58 (1928).

Furthermore, this Court has reviewed on many occasions lower court decisions to assure that Indian reservation status and reservation Indian rights afforded by treaties and federal statutes are not extinguished without a clear congressional determination to do so. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); and *DeCoteau v. District County Court*, — U.S. —, 43 L.Ed.2d 300 (1975) [Indian reservation status cannot be impliedly terminated by unilateral act of Congress]; *Squire* v. *Capoeman*, 351 U.S. 1 (1956) [Indian allotment

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[7] Indeed, the United States has twice argued before this Court that Public Law 280 did not comprehend a grant of state taxing authority. *See* Memorandum for the United States as Amicus Curiae, submitted May 1972, presented in response to an order of this Court requesting the views of the United States in Tonasket v. State of Washington, 411 U.S. 451 (1973); *See also* Brief for the United States as Amicus Curiae, submitted November, 1972, in Tonasket v. State of Washington, *supra*.

immunity is not extinguished by federal Internal Revenue Code]; *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968) [implied hunting and fishing treaty rights are not abrogated by federal termination acts]; *Morton* v. *Ruiz*, 415 U.S. 199 (1974) [Indian welfare assistance cannot be arbitrarily cut off for off-reservation Indians]; and *Morton* v. *Mancari*, 417 U.S. 535 (1974) [Indian employment preference is not eliminated by federal equal employment legislation]. Each of these important Indian rights has been protected by this Court from backhanded extinguishment —certainly the right of Indians to be free from state taxation while residing and working on their reservations in the absence of an *express* Act of Congress directing state taxation is of no less significance. *See McClanahan* v. *Arizona State Tax Commission;* 411 U.S. 164 (1973).

The scope of the grant of civil jurisdiction contained in Public Law 280 must be resolved by this Court. In the absence of a definitive decision on the issue of state taxing power, the lower courts will become ever more embroiled in an endless number of jurisdictional lawsuits pitting the United States and nearly one hundred Indian tribes and bands subject to Public Law 280 against the Public Law 280 states. The affected reservations will become more and more vulnerable to the whims of Public Law 280 state officials. Furthermore, Indian tribes will find it increasingly difficult to maintain their reservations as separate and distinct homelands.

American Indian tribes and their members require an answer to the question of whether Congress had indeed subjected their reservations to unlimited state taxing power. This Court has already ruled on the procedures necessary for the states to assume civil and criminal jurisdiction pursuant to Public Law 280, *Kennerly* v. *District Court*, 400 U.S. 423 (1970), and has previously passed on the relationship of Public Law 280 to the contemporaneous termination acts, *Menominee Tribe* v. *United States*, 391 U.S. 404

(1968). In addition, this Court has recognized the importance of resolving the scope of the civil grant of jurisdiction in Public Law 280 by its express reservation of the very problem two years ago in *McClanahan,* and by its action of accepting for review and then vacating and remanding a case raising the question of whether Public Law 280 conferred state cigarette taxing authority over reservation Indians. *Tonasket* v. *State of Washington, supra.*[8]

The issue of whether the conferral of civil jurisdiction in Public Law 280 constitutes an open-ended grant of state taxing power, presented squarely in this income tax case, is of national significance. It affects not only Indian tribes currently subject to the statute, but also all other American Indian tribes who may in the future elect, pursuant to the authority contained in 25 U.S.C. § 1322, to submit their members' disputes to state courts in order to facilitate the resolution of reservation conflicts.

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[8] On remand the Washington Supreme Court affirmed its earlier decision that Public Law 280 granted the State of Washington the power to tax reservation cigarette sales to non-Indians. In its holding, however, the court expressly stated that its decision neither dealt with taxes on trust property, personalty, inventory, gross receipts or income, nor disturbed this Court's holding in *Warren Trading Post* v. *Arizona State Tax Commission, supra,* that the states cannot tax retail sales by federally licensed Indian traders to reservation Indians. Tonasket v. State of Washington, 84 Wn.2d 164, 525 P.2d 744, 754 (1974), *appeal dismissed* — U.S. — (1975). Tonasket, on remand, therefore failed to resolve the important issues raised in this Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 1975

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1868

OMAHA TRIBE OF INDIANS, *et al., Appellants,*

v.

WILLIAM A. PETERS, *et al., Appellees.*

Appeal from the United States District Court for the District of Nebraska

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Submitted: March 31, 1975

Filed: May 9, 1975

Before GIBSON, Chief Judge, LAY and Ross, Circuit Judges.

Ross, Circuit Judge.

This suit for declaratory and injunctive relief was brought by the Omaha, Santee Sioux and Winnebago Indian tribes and certain tribe members who purported to represent a class of Indians similarly situated (Indians). Defendants are the Nebraska State Tax Commissioner and the Nebraska Department of Revenue (Nebraska), who seek to collect Nebraska taxes on income earned on the tribes' reservations by the Indians, who live on the reservations within the state of Nebraska. The lower court granted summary judgment for Nebraska and the Indians have appealed. We affirm.

In *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), the Supreme Court determined that Arizona could not tax the income of Navajo Indians in similar

circumstances. Nebraska argues for a different result here under the provisions of 28 U.S.C. § 1360 [1] which is not effec-

[1] 28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

tive in Arizona. We hold that the district court had jurisdiction and that 28 U.S.C. § 1360 permits the imposition of the tax here challenged.

Congress provided in 28 U.S.C. § 1341: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The courts have also refused to grant declaratory relief when the effect of the judgment would be to avoid the the jurisdictional strictures of section 1341. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299-302 (1943); *Miller* v. *City of Greenville*, 138 F.2d 712, 720 (8th Cir. 1943). The Indians do not deny the availability of adequate state remedies; [2] their position, the position of the United States as amicus curiae, and to some extent the position of Nebraska, is that the Indians are not required to exhaust state remedies because of their unique relationship to the federal government, as held in *Moses* v. *Kinnear*, 490 F.2d 21 (9th Cir. 1974); and *Agua Caliente Band* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) [hereinafter, *Agua Caliente*].[3]

In *Agua Caliente*, California was seeking to tax lessees of Indian lands held in trust by the United States. The United States was not a party to the suit and the Agua Caliente tribe had not exhausted remedies available in the California courts. In determining whether the federal courts had jurisdiction, the Ninth Circuit relied on the federal instrumentality doctrine. *Agua Caliente, supra,*

[2] *See* NEB. REV. STAT. §§ 77-2793 to 77-27101 (1971).

[3] *See also Federal Reserve Bank* v. *Commissioner of Corporations & Taxation*, 499 F.2d 60, 62-64 (1st Cir. 1974) where the court held that the Federal Reserve Bank of Boston did not have to exhaust state remedies under the provisions of 12 U.S.C. § 632, even though the United States was not a plaintiff. Earlier, in *United States* v. *State Tax Commission*, 481 F.2d 963, 975 (1st Cir. 1973), the First Circuit declined to apply the principles enunciated in *Agua Caliente* to federal savings and loan associations.

442 F.2d at 1185. The federal instrumentality doctrine, which had been approved by the Supreme Court in *Department of Employment* v. *United States,* 385 U.S. 355, 358 (1966), establishes that the exhaustion requirement of section 1341 is inapplicable to cases involving taxation of a United States instrumentality. Indian land has been regarded as an instrumentality of the United States, and the government's right to sue to protect such property has often been recognized by the courts. *E.g., Heckman* v. *United States,* 224 U.S. 413, 442-445 (1912). *Agua Caliente* held that since the Indian land involved was a federal instrumentality, the Agua Caliente tribe could assert the federal instrumentality doctrine even in the absence of the United States as a co-plaintiff, and compliance with 28 U.S.C. § 1341 was not necessary. *Supra,* 442 F.2d 1186. To reach this conclusion, the Ninth Circuit in *Agua Caliente* examined the seminal case which held that federal instrumentalities were not required to exhaust state remedies under section 1341: *United States* v. *Livingston,* 179 F. Supp. 9, 11 (E.D. S.C. 1959) (three judge court), *aff'd mem.,* 364 U.S. 281 (1960). The *Agua Caliente* court found that the rationale expressed in *Livingston* for allowing the United States to assert the doctrine applied with equal force to the Indians; therefore the Agua Caliente tribe was allowed to assert the federal instrumentality exception to 28 U.S.C. § 1341. *Supra,* 442 F.2d at 1186.

The second case relied upon to excuse the exhaustion of state remedies here is *Moses* v. *Kinnear,* 490 F.2d 21 (9th Cir. 1974). That case was brought by two Indians to enjoin the state of Washington from imposing excise taxes on cigarette sales on Indian trust lands and an Indian reservation. The United States was not a party. The *Moses* court analogized that case to those in which the United States had sued in conjunction with servicemen to protect them from dual taxation in violation of the Soldiers' and Sailors' Civil Relief Act. In *United States* v. *Arlington County,* 326 F.2d 929, 933 (4th Cir. 1964), and *United States* v. *Sullivan,* 270 F. Supp. 236, 240 (D. Conn. 1967), *aff'd,* 398

F.2d 672 (2d Cir. 1968), *rev'd on other grounds,* 395 U.S. 169 (1969), the courts held that the federal government could sue to enforce its national defense policies for the benefit of naval officers, even in the absence of statute. Since the United States could maintain the suits without complying with 28 U.S.C. § 1341, the servicemen in *Arlington County* and *Sullivan* were also excused from exhausting state remedies. *Moses* v. *Kinnear* held that these cases under the Soldiers' and Sailors' Civil Relief Act established that the federal instrumentality doctrine applied when the government sued in conjunction with those in whom it had a special interest, in order to enforce important federal policies. *Supra,* 490 F.2d at 25. The Ninth Circuit noted that the United States historically has had a special interest in its Indians which had manifested itself in a policy to protect Indians and Indian property from illegal state taxation; therefore the Indians in *Moses* v. *Kinnear* came within the federal instrumentality doctrine exception to 28 U.S.C. § 1341. Finally, *Moses* v. *Kinnear* adopted the earlier holding of *Agua Caliente* that the federal instrumentality doctrine could be asserted in the absence of the government by a private party who could be a co-plaintiff of the United States. *Supra,* 490 F.2d at 25.

It thus appears that the "co-plaintiff doctrine" established by *Agua Caliente* and *Moses,* and relied upon by the Indians in this case as justification for their failure to exhaust state remedies, is grounded on three propositions: 1) Indian lands are federal instrumentalities, and therefore reservation Indians are not required to exhaust state remedies under the statute when trust, restricted, or reservation lands are involved, according to *Agua Caliente*; 2) the federal instrumentality doctrine also applies when the government sues on behalf of individuals, including Indians, in whom it has a special interest to vindicate important federal policies under *Moses* v. *Kinnear;* 3) the reasons for not requiring the government to exhaust state remedies apply to Indians, and since the United States could be a co-plaintiff, and could have asserted the federal instrumentality excep-

tion to section 1341, Indian tribes or individual Indians may assert it as well. The United States has assured us during oral argument that they would have joined as plaintiffs if they had known of the case. Under these circumstances we conclude that the federal court has original jurisdiction in this case, notwithstanding 28 U.S.C. § 1341.

Turning to the merits, it is established that under article 1, section 8 of the Constitution,[4] the state has no right to tax this income unless Congress has expressly allowed them to do so. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973). Since *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), the courts have recognized the special relationship between the United States and its Indian peoples, frequently described as a guardian-ward relationship. UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 557 *et seq.* (1958). But since early in our nation's history its Indian policies have been designed to terminate its guardianship over Indian tribes as they are assimilated into society as equals. *Worcester* v. *Georgia, supra,* 31 U.S. (6 Pet.) at 556; *Williams* v. *Lee,* 358 U.S. 217, 220 (1959); *Omaha Tribe* v. *Village of Walthill,* 334 F.Supp. 823, 836 (D. Neb. 1971), *aff'd,* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973). The statute in question, 28 U.S.C. § 1360, is in furtherance of the policy of ending federal protection of Indians. Congress described its purposes: "First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." U. S. CODE CONG. & ADMIN. NEWS 2409 (1953).

The statute not only gives Nebraska jurisdiction over civil causes of action to which Indians are parties or between Indians, but more importantly, also gives Nebraska's civil laws of general application the same force on Indian reservations as elsewhere in the state. It seems clear to us

[4] "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . ." U. S. CONST. ART. I, § 8.

that "civil laws" in this context includes everything but "criminal" laws, especially when the statute is read in conjunction with 18 U.S.C. § 1162, which grants criminal jurisdiction to the states, and was passed at the same time. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. Thus it appears that Congress intended to make all of Nebraska's civil laws, but those specifically excepted by the statute's terms, applicable to Indians. We do not need to give the words of section 1360 "a more extended meaning than their plain import", *Worcester* v. *Georgia, supra,* 31 U.S. (6 Pet.) at 581, (McLean, J., concurring), in order to find that "civil laws . . . of general application" embrace the income tax laws of the state.

For Indians, as well as for other citizens, exemptions from the tax laws should be clearly expressed. *McClanahan* v. *Arizona State Tax Commission, supra,* 411 U.S. at 176; *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 156-157 (1973); *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956). In 28 U.S.C. § 1360(b) Congress granted such a tax exemption for Indian property which is restricted or held in trust by the United States. This subsection is instructive because it shows that Congress was aware that state revenue laws were among those which would become applicable to Indians under the provisions of section 1360(a). In our opinion Congress considered this result and determined that it was not desirable to allow the states to tax the properties expressly mentioned in subsection (b). Congress did not express an exemption from other taxation as it easily could have done, and it is not this Court's place to do so now. We hold that Congress has exercised its constitutional power to allow Nebraska to impose taxes upon the income of reservation Indians earned on the reservation by passage of 28 U.S.C. § 1360. Accordingly, we affirm the decision of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT, D. NEBRASKA

OMAHA TRIBE OF INDIANS ET AL., *Plaintiffs,*

v.

WILLIAM A. PETERS, Individually and as Nebraska State Tax Commissioner, and the Nebraska Department of Revenue, *Defendants.*

Civ. 74-L-13.

Oct. 1, 1974.

Memorandum

RICHARD E. ROBINSON, Senior District Judge.

This matter is before the Court on the parties competing motions for summary judgment. The jurisdiction of the Court is established under 28 U.S.C.A. §§ 1331 and 1362. The matter has been submitted to the Court on the parties pleadings and briefs and the Court is now prepared to rule.

The facts of the case are not in dispute. Plaintiffs are the Omaha, Santee Sioux and Winnebago Tribes of Indians, and three individual members of those tribes. Each of the tribes has a reservation in the State of Nebraska. Each of the individuals reside and are employed wholly upon one of the reservations. Each individual plaintiff has been subjected to income tax by the defendant Department of Revenue, and Director of Revenue of the State. Plaintiffs contend that the State income tax was unlawfully applied to them under the rule of McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 [1973].

In *McClanahan* a unanimous Supreme Court held that an Indian's income derived from employment performed wholly on an Indian reservation could not be subjected

to state income taxes. The present case raises a question of law expressly reserved in *McClanahan.* That is, whether or not a state which has assumed civil jurisdiction over an Indian reservation pursuant to Act of Aug. 15, 1953, Public L. No. 83-280, § 4, 67 Stat. 588, 589 [1] may collect income taxes from tribal members who reside and are employed wholly upon the reservation.

Before turning to the issue in this case it will be helpful to further develop the facts and holding of *McClanahan.*

In that case the State of Arizona attempted to impose its income tax on the petitioner, a Navajo Indian, who was employed wholly upon the Navajo reservation. Though the State had no civil or criminal jurisdiction over the reservation, the State reasoned that the assessment of income taxes against individual Indians would not jeopardize the self-government of the Navajo tribe and, therefore, the tax was not unlawful under the rule of Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 [1959]. The Supreme Court, however, found the *Williams* rule to be inapplicable in this situation. The Court found that the State's authority to tax Indians on an Indian reservation depended not upon the tribe's right of self-government, but rather upon the individual's rights as an Indian under prior decisional law, treaties and statutes.

Though the Court found no express grant of Indian immunity to state revenue laws either in applicable treaties or federal statutes, it did find language which arguably supported the notion that state governments did not have the authority to tax Indian incomes. It noted that the Navajo treaty set aside designated lands for their use and occupation and prohibited nontribal members from entering onto tribal lands. It also noted that the Buck Act, 4 U.S.C.A. § 105 et seq. which subjected persons living

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[1] For the current status of this act *see* 28 U.S.C.A. § 1360 [1962] and 25 U.S.C.A. § 1321 [Supp. 1964].

on a federal reservation to state sales, use and income taxes, expressly excluded Indians "not otherwise taxed" from its provisions. Finally, it noted that the Arizona Enabling Act, 36 Stat. 557, A.R.S., required the state to recognize the Indian reservations within its borders and prohibited the state from taxing lands within an Indian reservation. All of these factors, the Court reasoned, had to be viewed against the backdrop of the notions of Indian sovereignty developed in the cases of Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 [1832], and The Kansas Indians, 72 U.S. 737, 5 Wall. 737, 18 L.Ed. 667 [1867] and refined in latter cases such as Williams v. Lee, *supra*. The Court apparently recognized that the Indian sovereignty doctrine had measurably changed over the years and that it alone would not support an Indian state tax immunity. However, all of the noted factors led the Court to its holding that such an immunity existed. This view was reinforced by the observation that in the absence of state jurisdiction within the Indian reservation, the state would be powerless to enforce its revenue laws as against reservation Indians.

The *McClanahan* decision would dispose of this case were it not for the following statute which clearly applies to the facts of the present case.

> § 1360 State civil jurisdiction in actions to which Indians are parties:
>
> "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within

> such Indian country as they have elsewhere within the State . . .:
>
> "State . . . of Indian country affected
>
> . . . . . .
>
> Nebraska . . . All Indian country within the State
>
> . . . . . .
>
> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto. . . ."

Act of Aug. 15, 1953, Public L. No. 83-280, § 4, 67 Stat. 588, 589. [hereinafter referred to as P.L. 280].

The language and intended purpose of the above statute bears significantly on the rationale employed in *McClanahan*. The language in subsection [a] of the above-quoted statute is a sweeping grant of jurisdiction to the State of Nebraska to govern the lives and affairs of Indians living on an Indian reservation.[2] Plaintiffs contend, however,

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[2] The Act of August 15, 1953, Public Law No. 83-280, 67 Stat. 588, conveyed both civil *and* criminal jurisdiction over Indian country in the State of Nebraska. However, in 1969 the Nebraska legislature passed a resolution, pursuant to 25 U.S.C.A. § 1323 [Supp. 1974] which retroceded its jurisdiction over criminal offenses committed by or against Indians on the Omaha reservation in Thurston County, Nebraska. This retrocession was partially accepted by the Secretary of the Interior of the United States in October of 1970. *See* Omaha Tribe of Nebraska v. Village of Walthill, Nebraska, 460 F.2d 1327 [8th Cir. 1972]. Since then the State of Nebraska has not exercised criminal jurisdiction over Indian country in Thurston County except such criminal juris-

that the Indian immunity found by the Court in *McClanahan* has not been expressly or impliedly repealed by Congress through P.L. 280. They base this contention on several theories which may be fairly summarized as follows: [1] The reluctance of Courts to interpret new laws as impliedly repealing long-standing federal treaties, statutes or policies; and [2] the fact that subsection [b] of P.L. 280, withholding certain powers from the states, indicates that Congress intended to retain powers over the commerce and properties of Indians, thereby preventing the state from enforcing its revenue laws against the plaintiffs.

As to plaintiff's first contention, it should be noted that P.L. 280 does not subject Indians to the jurisdiction of the state *by implication*. The statute is a clear and express grant of power subject only to the limitations stated in the ensuing sections of the statute. The question here is whether this broad and express grant of power includes the state's power to tax. The Court finds that subsection [a] does include such power. It is persuaded to that view for several reasons.

First of all, while *McClanahan* held that reservation Indians who earned their income on the reservation could not be subjected to a state income tax when the state had no jurisdiction over the Indians or Indian country, the underlying rationale of that case cannot prevail when, as here, the state clearly does have jurisdiction over the tribe.

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diction as was not retroceded. Though the fact of this retrocession tends to create a distinction between the Omaha tribe and the other two tribal plaintiffs in this action, the distinction is not significant. After the retrocession the State of Nebraska continued to possess all of the civil jurisdiction conveyed to it under P.L. 280. This action, involving the state's authority to enforce its revenue laws in Indian country, involves a question affecting each of the three tribal plaintiffs equally, since it raises a question concerning the civil authority of the state under P.L. 280.

There can be no question as to Congress' plenary power over Indian tribes within the boundaries of the United States. United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 [1886]; Worchester v. Georgia, (sic), 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 [1832]. That power, obviously encompasses the power to enact and enforce such laws as are in the tribe's best interest. United States v. Kagama, *supra,* 118 U.S. at 384, 6 S.Ct. 1109. That includes the power to end the federal guardianship over the tribes when, and if, that is found by Congress to be in their best interest. Board of Comm'rs v. Seber, 318 U.S. 702, 63 S.Ct. 914, 87 L.Ed. 1091 [1943]; United States v. Ramsey, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 [1926]. The cases strongly suggest that that power exists despite treaty provisions which purport to guarantee the integrity of the tribe and tribal lands. *See e.g.* Act of June 17, 1954, c. 303, § 1, 68 Stat. 250; Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 [1968]. Given Congress' power to end the federal guardianship in total, it obviously has the power to establish an orderly program looking to the day when the guardianship can be ended. That is precisely the type of program evidenced by the statute in this case. *See* U.S.Code Cong. & Admin. News, p. 2409 et seq. [1953]. The statute also suggests that Congress felt that the termination of the federal guardianship over the affected tribes should result in their assimilation into the mainstream of life of the states wherein they are located. P.L. 280 is a step intended to prepare the Indian tribes for this assimilation by making all state laws applicable to Indians and in Indian country except as those laws may contravene the provisions of the statute itself.

Congress' power to convey jurisdiction upon the states necessarily includes the power to cause Indians and Indian country to be subjected to the revenue laws of the state, the *McClanahan* case notwithstanding. The Indian state

income tax immunity recognized in *McClanahan* was based upon certain ambiguous statutory and treaty provisions which were clarified when they were read against the background of the Indian sovereignty doctrine. For example, the treaty involved in the *McClanahan* case provided that certain lands would be set aside "for the use and occupation of the Navajo tribe of Indians" and "no person except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 667, 668; McClanahan v. Arizona State Tax Comm'n, *supra,* 411 U.S. at 174, 93 S.Ct. at 1263. The Court, noting that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation" said:

> "When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos . . . was meant to establish the lands as within the exclusive sovereignty of the Navajos under general supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation."

Id. 411 U.S. at 174-75,, 93 S.Ct. at 1263. This rationale while applicable when the taxing authority lacks jurisdiction over Indians and Indian country is not applicable when the taxing authority has jurisdictional power over the tribe. In the cases of Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 55 S.Ct. 820, 79 L.Ed. 1517 [1935]; Leahy v. State Treasurer, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771 [1936]; Choteau v. Burnet, 283 U.S. 691,

51 S.Ct. 598, 75 L.Ed. 1353 [1931]; the Court recognized that Indian income was taxable when, as here, the taxpayer was subject to the jurisdiction of the state or federal taxing authority, and the property to be taxed was not excluded from taxation by treaty or statute. In the present case, the plaintiffs are subject to the limited jurisdiction of the State of Nebraska and the property to be taxed is not exempt under applicable treaty provisions or statutes.

In *McClanahan* the court also relied upon the Buck Act, 4 U.S.C.A. § 105 et seq. by noting:

> "While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians . . . had it thought that the States had residual power to impose such taxes in any event."

However, the fact that Congress exempted Indians from the provisions of the Buck Act, obviously does not detract from its power to affirmatively subject Indians to state income taxes by an appropriate grant of jurisdiction.

Finally, the Court relied upon certain provisions of the Arizona Enabling Act which prohibited the state from assuming jurisdiction over Indian Lands. This rationale is, however, equally inappropriate in light of the facts of the present case since P.L. 280 expressly provides for the amendment of state constitutions to permit the various states to assume jurisdiction over Indian country.

Since the rationale employed in *McClanahan* seems clearly inappropriate in this case, and since Congress' power to convey jurisdiction to the states seems unquestionable, the only remaining question is whether or not the language in P.L. 280 is broad enough to cause reservation Indians to be subjected to the state's taxing authority.

The language and structure of P.L. 280 strongly suggest that Congress intended to convey to the states the authority

to enforce its revenue laws in Indian country. The statute grants civil jurisdiction to the states over causes of actions involving Indians as parties and states that the civil laws of general application shall have the same force and effect as to Indians and within Indian country as they have throughout the state. This grant of power is then modified in later subsections to permit the federal government to retain its authority in certain areas such as over Indian trust property. One can only presume that the grant of jurisdiction in subsection [a] was to be considered plenary except as it was expressly limited by the statute. Any other interpretation of subsection [a] would require this Court to read into that section something which simply is not there. If Congress had intended to exempt Indians from the state's revenue laws, the Court feels certain that it would have expressly done so, as it exempted certain other Indian property from state jurisdiction in subsection [b] of P.L. 280, and as it expressly exempted reservation Indians from the provisions of the Buck Act. 4 U.S.C.A. § 109. By failing to qualify subsection [a] Congress has expressly subjected Indians and Indian country to *all* state laws of general application including state revenue laws except where the application of those laws would violate one of the stated jurisdictional limitations in the statute.

The above interpretation is strongly supported by the legislative history of P.L. 280. U.S.Code Cong. & Admin. News, pp. 2409, 2412 [1953] indicates that P.L. 280 was drafted because

> "the Indians of several States have reached a stage of acculturation and development that makes desirable extension of States civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable."

It was Congress' goal that this legislation be a step toward the day when the federal trusteeship over Indians could be finally ended through the assimilation of the tribes into the mainstream of life of the affected states. *Id.* at 2409; Williams v. Lee, *supra,* 358 U.S. at 220, 79 S.Ct. 269. There is no suggestion in either the legislative history of the Act, or in the language of the Act itself, that Congress intended that Indian tribes should derive the advantages of state law, while, at the same time, being shielded from its burdens.

Plaintiffs, however, contend that subsection [b] of P.L. 280 precludes the collection of state income tax in this case. They argue that since Indian trust property cannot be alienated, encumbered, or taxed, the state lacks the power to enforce its revenue laws. Alternatively, they argue that this exception evidences a Congressional intent that subsection [a] of P.L. 280 was not intended to grant to the states the power to tax Indians. Neither argument is persuasive. First, subsection [b] applies only to real property that is held *in trust* by the federal government. The income in this case is the sole property of the plaintiffs. *See* Choteau v. Burnet, *supra,* 283 U.S. at 695, 51 S.Ct. 598. Secondly, if the general trusteeship of the federal government were held to cover all property owned by Indians, then the state would not only lack the power to enforce its revenue laws, but *all* of its civil laws against Indians, since it would have no authority to enforce its judgments. This result was never contemplated by the drafters of P.L. 280. The statute clearly makes Indians proper party defendants, as well as plaintiffs, and any interpretation which would so clearly defeat the statute's logical and intended purpose should be avoided.

Accordingly, an Order will be entered overruling the plaintiffs' Motion for Summary Judgment and sustaining the defendants' Motion for Summary Judgment.

Public Law 280

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State

"State of	Indian Country Affected
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4 Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section

1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal

treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

H. R. 1063

Monday, June 29, 1953

House of Representatives,
Subcommittee on Indian Affairs,
Committee on Interior and
Insular Affairs,
Washington, D.C.

The subcommittee thereupon proceeded to the consideration of H. R. 1063, Honorable E. Y. Berry (chairman) presiding.

Mr. Berry. We will next take up H. R. 1063.

Statement of Harry A. Sellery, Jr., Chief Counsel Bureau of Indian Affairs

Mr. Sellery: Mr. Chairman and members of the committee, H. R. 1063 is a bill to amend Title 18 of the United States Code entitled "Crimes and Criminal Procedure" with respect to State jurisdiction over offenses committed by or against Indians in the Indian country and to confer on the State of California civil jurisdiction over Indians in that State.

The State now lacks jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country as defined in Title 18, section 1151 of the United States Code, except in the case of the Agua Caliente Indian Reservation. State criminal jurisdiction over this one reservation was previously conferred.

The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called ten major crimes listed in section 1153 of Title 18, United States Code. As a practical matter, the enforcement of law and order among the

Indians in the Indian country has been left largely to the Indian groups themselves, and in California they are not adequately organized to perform that function. Consequently, the Department believes there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State, and the Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian country in that State.

At the direction of the Commissioner of Indian Affairs, the Area Director of the Bureau of Indian Affairs at Sacramento, California, consulted with the various Indian groups on a legislative proposal similar to H. R. 1063, and none of them have indicated any opposition to the enactment of a bill such as this. The Hoopa Valley Indians, comprising the largest single group within the State, have adopted resolutions favoring the proposal to confer civil and criminal jurisdiction on the State. Representatives of other groups have done likewise. The California Legislature has memorialized Congress in favor of this legislation and certain other legislation not before us this morning.

The Department recommends that the bill be recast in a form which is attached as a substitute bill which would, we believe, assist in the codification in this bill of the existing sections of the civil and criminal codes of Title 18 for the criminal aspects and Title 28 of the judicial code for the civil aspects. If this type of bill is adopted, we hope it may be a prototype and it will be possible to add Indians in other States in the code so that, from the point of view of an attorney looking into this matter, he will be able to determine more, we believe, than otherwise would be the case what the State civil and criminal jurisdiction may be with respect to Indians of a particular State.

You will observe, for example, on page 2 of the draft substitute bill that in the case of California, the Indian

country affected is that within the Federal-State civil and criminal jurisdiction, which will no longer obtain, as the State is given jurisdiction over all of the Indian country within the State.

It appears in the case of some of the other criminal and civil jurisdiction bills that the Department will recommend to the Congress that certain reservations be excepted where law and order are regarded as adequate and where the tribe affirmatively indicated its preference for confirmation under its law and order code. But this prototype form we believe will assist in cases of civil and criminal jurisdiction as showing quickly at places in the code where we believe it will be most helpful to attorneys and others what Indian country, if any, may be excepted from State civil and criminal jurisdiction.

It may also be observed that there are provisions in the bill which will, we believe, protect the rights of Indian groups without special recognition from the Congress in the form of a treaty, agreement, or statute with respect to hunting, trapping, or fishing or control of licensing and the regulation thereof, and with those protections both on the criminal side and the civil side in the bill it would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, so that they will be subject to the same laws and the same rules as the other citizens.

The Department has recommended that the bill be adopted, but the suggestions of the substitute bill are intended to be of assistance in the uniform treatment of this and other bills.

In order to have it absolutely uniform with respect to California, it is recommended that section 1 of the Act of October 5, 1949, which conferred on the State of California civil and criminal jurisdiction over the land and residents

of the Agua Caliente Indian Reservation, be repealed so that there will be the same rule applicable to all Indians in the State.

I would direct your attention to the fact that the Department has submitted this report because of the express desire of the committee to have it without having first received prior clearance from the Bureau of the Budget. Hence the Department cannot make any commitment at this time concerning the relationship of the views of the Department to the program of the President. However, copies of this report have been submitted to the Bureau of the Budget, and it is hoped we will know within a few days whether or not they believe it is in accord with the program.

Mr. Berry Are there any questions?

Mr. Saylor. You have listed in the substitute bill a method to have this as a prototype which will be used for other Indian tribes. You have started here with the State of California, and I would like to have submitted by the Department a recommendation not only with respect to the State of California but in regard to every other one of the western States that have Indians or every State that has Indians, including South Carolina, North Carolina, and Florida. This committee should know what the views of the Department are at the present time not only with regard to the Indians of California but in regard to all of the Indians in all of the States.

Mr. Sellery. I will see that that is done.

Mr. Saylor. Also what Indian country you would recommend, whether all Indian country within the State or whether certain parts of the Indian country can be excepted.

Mr. D'Ewart. The phrase "Indian country" is already defined by law and has a very distinct meaning. It is defined in the recodification statutes adopted a very few years ago, and it is very clear.

Mr. Saylor. I think also the committee should have the benefit of the Department's views. You state there are certain sections of the Code which would not be applicable in the State of California, and I think we should be advised as to the sections which would not be applicable not only to this law but any other law which might be affected if a similar Act were adopted for all of the Indians.

Mr. Sellery. I wonder if you may have misunderstood me. We are recommending that the State have civil and criminal jurisdiction over all Indians in the State of California and the concurrent jurisdiction of the United States in connection with the ten major crimes and similar criminal acts be ceded to the State so that there will be nothing except State jurisdiction in the State of California. There will be no exception.

Mr. Saylor. Then, I understood, as a second amendment you said you had here in this supplemental bill—was it not the purpose of making sure there would not be concurrent jurisdiction in the State and Federal Government?

Mr. Sellery. That is true.

Mr. Shuford. I think we in North Carolina have only one tribe of Indians—the Cherokees—although we have Indians in the eastern part of North Carolina. Are those under the supervision of the Bureau of Indian Affairs?

Mr. Sellery. Yes, sir; they are. The eastern band of Cherokees is separated from the balance of the North Carolina Indians.

Mr. Shuford. We also have Indians in the eastern part of North Carolina.

Mr. Sellery. I am advised they are not.

Mr. Shuford. I do not think that tribe has definitely been established by the courts.

Mr. Sellery. In any event, they are not under the jurisdiction of the Bureau of Indian Affairs.

Mr. Rhodes. I would like to request the Department to consider whether or not the State feels that the Indians within the State are ready for this type of jurisdiction and also whether the State itself is ready.

Mr. Sellery. In the case of California—I skipped over that point—the State has indicated its willingness.

Mr. Rhodes. I am thinking of Arizona as to what effect it might have on the law enforcement agencies of the State of Arizona and also whether the Indians of Arizona have expressed any views.

Mr. Sellery. I think such inquiries are in process with respect to other bills.

Mr. Young. Does your bill limit the provision for Federal assistance to States in defraying the increased expenses of the courts in connection with the widening of the jurisdiction that the bill encompasses?

Mr. Sellery. No; it does not.

Mr. Young. Do you think it would be necessary to provide for some payment, inasmuch as the great portion of Indian lands are not subject to taxation?

Mr. Sellery. The Department's report on the Nevada bill has some comments on that. If it is appropriate, I would like to read this in that connection. Generally, the Department's views are that if we started on the processes of Federal financial assistance or subsidization of law enforcement activities among the Indians, it might turn out to be a rather costly program, and it is a problem which the States should deal with and accept without Federal financial assistance; otherwise there will be some tendency, the Department believes, for the Indian to be thought of and perhaps to think of himself because of the financial

assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians.

Mr. Young. That would not quite be true, though; would it? Because for the most part he does not pay any taxes.

Mr. Sellery. No. There is that difference.

Mr. Young. A rather sizable difference in not paying for the courts or paying for the increased expenses for judicial proceedings.

Mr. Sellery. The Indians, of course, do pay other forms of taxes. I do not know how the courts of Nevada are supported financially, but the Indians do pay the sales tax and other taxes.

Mr. Young. But no income tax or corporation tax or profits tax. You understand a large portion of the land is held in trust and therefore is not subject to tax.

Mr. Sellery. That is correct.

Mr. Young. So far as my State is concerned, it would be a large burden on existing costs of judicial procedure. I think it is only right that the Federal Government should make some contribution for that. You seem to differentiate. I think there is a differentiation, too, in that they are not paying taxes.

Mr. Sellery. I will concede your point that they are not paying taxes. The Department has recommended, nevertheless, that no financial assistance be afforded to the States.

Mr. Berry. Is there no authority now for the Department to assist counties in this work?

Mr. Sellery. I am advised there is none.

Mr. D'Ewart. That is only partly true. The Tribal Council sometimes appropriates some funds to help pay the peace officer, and the counties sometimes appoint an Indian as deputy sheriff to cooperate with the towns.

Mr. Sellery. I think Congressman Berry was addressing himself to funds advanced by the Federal Government.

Mr. D'Ewart. Have not you ever paid part of the salary of a sheriff?

Mr. Sellery. Mr. Benge, who is chief of our Law and Order Branch, advises me we have not.

Mr. D'Ewart. I was thinking of the Reindeer Reservation where part of that salary was paid. Maybe I am wrong. Maybe they were only using tribal funds.

Mr. Sellery. I think so. That is done in many cases, as you correctly observe.

(The subcommittee thereupon went into executive session.)

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1975

No. 75-169

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY RABBIOSI, FELIX W. WHITE, JR., and DIANA LaPOINTE, Individually and on Behalf of All Other Similarly Situated Persons,
Petitioners,

vs.

WILLIAM A. PETERS, Individually and as NEBRASKA STATE TAX COMMISSIONER and THE NEBRASKA DEPARTMENT OF REVENUE,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court's opinion is reported in 382 F. Supp. 421 (D. Neb. 1974). The opinion of the Court of Appeals is reported in 516 F. 2d 133 (8th Cir. 1975).

JURISDICTION

The jurisdictional requisites are set forth in the petition.

———o———

QUESTION PRESENTED

Respondents accept the Question Presented set forth in the petition.

———o———

STATUTE INVOLVED

The pertinent provisions of 28 U. S. C. § 1360 are set forth in the petition.

———o———

STATEMENT

Respondents will accept petitioners' Statement of the Case.

———o———

ARGUMENT

I.

No substantial federal question is involved.

This Court has already been presented with a substantially identical question, and resolved it adversely to

the position of petitioners. *Tonasket v. State,* 79 Wash. 2d 607, 488 P. 2d 281 (1971), involved the imposition of the Washington cigarette tax on an Indian reservation. The Court held that Public Law 280 authorized the collection of the tax. This Court, at 411 U. S. 451, 36 L. Ed. 2d 385, 93 S. Ct. 1941 (1973), vacated the judgment and remanded the case for reconsideration in light of *McClanahan v. Arizona Tax Commissioner,* 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), and some newly enacted state legislation.

On remand, the Washington court, in *Tonasket v. State,* 84 Wash. 2d 164, 525 P. 2d 744 (1974), modified its original opinion in light of the amended state statutes, but as to the question of the authority of the state to impose its cigarette tax on the reservation, the court adhered to its original position.

This Court, at 420 U. S. 915, 43 L. Ed. 2d 387, 95 S. Ct. 1108 (1975), dismissed the appeal for want of a substantial federal question. In view of the fact that the issue in that case was, to all intents and purposes, identical to that involved herein, it is difficult for us to see how there could be a substantial federal question in this case, requiring the granting of certiorari, when there was none in *Tonasket.*

II.

The decision of the Court of Appeals is clearly right.

The question of whether 28 U. S. C. § 1360 authorizes the states involved to impose their taxes on activities taking place on the reservations is an elementary problem

of statutory construction. It would pose no difficulty to someone who did not arrive at the answer before he considered the reasons for the answer. A law student who reached a result different from that reached by the courts below should not expect to get a passing grade on that question.

Subsection 1360(a) makes the "civil laws" of the state applicable to Indian country. Surely no one can argue that the revenue laws of a state are not "civil laws . . . that are of general application to private persons or private property." In that connection we call the Court's attention to *Goudy v. Meath*, 203 U. S. 146, 51 L. Ed. 130 (1906), in which this Court construed an act making Indians "subject to the laws, both civil and criminal, of the state or territory in which they may reside." This Court said:

> "Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens,—that is, that no exemption exists by implication, but must be clearly manifested. . . ."

If there were any doubt about the proposition that subsection 1360(a) granted taxing powers to the states, it is resolved by subsection 1360(b), which provides that nothing in the section shall authorize the taxation of any real or personal property belonging to any Indian or Indian tribe that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. Obviously, Congress felt that subsection

1360(a) would grant the states power to tax Indian property, and it was necessary to put in subsection (b) to limit that power. If subsection (a) did not grant taxing power to the states, why would it have been necessary to put in the specific exemption contained in subsection (b)? And if Congress intended to grant a general exemption from state taxation, why didn't it do so? We assume Congress is capable of expressing its wishes in reasonably clear language. Note the general, all-inclusive language used in 4 U. S. C. § 109 to exclude taxation of Indians from the operation of the Buck Act. Petitioners have not attempted to point out what language in subsection (a) would make trust property liable for state taxation, but would not make other tax laws applicable.

It is presumed that every provision of an act has some purpose and effect. If subsection (a) did not grant taxing powers to the state, the exemption specified in subsection (b) is meaningless. The maxim, expressio unius est exclusio alterius, is applicable here. Congress having elected to specify certain limited exemptions, instead of using general language, it manifested its intent not to grant other exemptions.

The decisions of the courts below are perfectly consistent with *McClanghan v. Arizona Tax Commissioner*, 411 U. S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973). As a matter of fact, *McClanahan* would become unintelligible if the Court were to hold that conferral of jurisdiction over the reservations did not give the states taxing powers. The whole rationale of *McClanahan* was to the effect that Arizona could

not enforce its tax laws on the Navajo Reservation because its laws were not applicable there. The Court referred to the fact that Arizona had not assumed jurisdiction over reservation Indians pursuant to 25 U. S. C. § 1322(a), and said that it could not believe Congress would have required the consent of the Indians affected and the amendment of state Constitutions if the states were free to accomplish the same goals unilaterally by simple legislative enactment. It is true that in a footnote the Court specifically reserved the question of the effect of compliance with 25 U. S. C. § 1322 on the states' taxing powers, but the implication is certainly there that it would change the result.

What petitioners would have this Court say, and what the Court will be saying if it adopts petitioners' position, is that Arizona can't impose its taxes within the Navajo Reservation because it has no civil or criminal jurisdiction over such territory, but even if it did, it still couldn't. The entire basis for the holding in *McClanahan* is destroyed if this case is reversed.

Mescalero Apache Tribe is completely consistent with the decision of the lower court. In that case the Court held that even the tribe itself, when it operated off the reservation, and hence in an area where state laws were applicable, was subject to the state tax laws, pointing up the fact that Indian "immunity" from taxation is simply a reflection of a lack of territorial jurisdiction of the taxing authority, and not a tax exemption, as such. For example, the Court said:

> ". . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e. g., Puyallup Tribe v. Department of Game, 391 U. S. 392, 398, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968); Organized Village of Kake, supra, at 75-76, 7 L. Ed. 2d 573; Tulee v. Washington, 315 U. S. 681, 683, 86 L. Ed. 1115, 62 S. Ct. 862 (1942); Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. Ed. 709, 48 S. Ct. 333 (1928); Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see Ward v. Race Horse, supra, at 516, 41 L. Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See Organized Village of Kake, supra."

Once state law has been extended to the reservation, the distinction between an on and off-reservation activity disappears.

Throughout this litigation petitioners have spoken of Indian exemption from taxation, which must be specifically repealed before taxes can be imposed. We submit that such an exemption does not exist (except such exemptions as are specifically created by 28 U. S. C. 1360 (b), and similar statutory provisions). The general "exemption" is lack of jurisdiction, which disappears with the conferral of jurisdiction. If such an exemption existed one would expect it to be applicable to federal taxation, also. But this Court has consistently held Indians to be subject to federal income taxation. See *Choteau v. Burnett*, 283 U. S. 691, 75 L. Ed. 1353, 51 S. Ct. 598 (1931), and *Five Civilized Tribes v. Commissioner*, 285 U. S. 418, 79 L. Ed. 1317, 55 S. Ct. 820 (1935). The income in question in this litigation is, of course, subject to federal income taxation. Indeed, if it were not, it would

not be subject to Nebraska's income tax, as Nebraska uses a "piggyback" tax. Why the "exemption" should bar state taxation, but not federal taxation, when both the state and federal governments have jurisdiction of the reservation, has not been explained.

CONCLUSION

The decision of the Court of Appeals was correct. Faced with the identical issue, this Court has once before concluded that no substantial federal question was involved. It should reach the same conclusion again.

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IN THE

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No. 75-169

OMAHA TRIBE OF INDIANS, SANTEE SIOUX TRIBE OF INDIANS, WINNEBAGO TRIBE OF INDIANS, MARY RABBIOSI, FELIX W. WHITE, JR., and DIANE LAPOINTE, individually and on behalf of all other similarly situated persons,

Petitioners,

v.

WILLIAM A. PETERS, individually and as NEBRASKA STATE TAX COMMISSIONER and the NEBRASKA DEPARTMENT OF REVENUE,

Respondents.

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioners and Respondents have filed with the Clerk of this Court written stipulations consenting to the filing of this brief.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (hereinafter referred to as NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations are also eligible for membership. The members all are leaders duly elected or appointed by their people according to their tribal constitutions or governing instruments. Approximately 188 federally recognized tribes having a population of approximately 540,000 people are represented in NTCA. The chairmen of the Omaha, Winnebago, and Santee Sioux Tribal Councils are members of NTCA. The purpose of the NTCA, as the official voice of elected Indian leaders, is to encourage the preservation of Indian cultures and promote economic, political and social progress among Indian people. Specifically, NTCA declares it its purpose, *inter alia,* to insure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not modified or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

The Omaha Tribe, the Santee Sioux Tribe, and the Winnebago Tribe and the individual Indian petitioners, on February 4, 1974, sued the respondent Nebraska State Tax Commissioner to enjoin him from administering the state personal income tax laws on reserva-

tions within the state. Petitioners claim that the State of Nebraska has no authority to tax income earned by individual Indians on reservations within the State and that the immunity against State taxation established in *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973), applies to Nebraska reservation Indians. The U.S. District Court for the District of Nebraska granted summary judgment in favor of the Respondents, ruling that because the State of Nebraska had civil jurisdiction over Nebraska reservations pursuant to Public Law 83-280, 28 U.S.C. § 1360 (1970), that the immunity secured in *McClanahan* did not apply. On appeal, the Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court.

The holding of the Court of Appeals that Public Law 280 authorized Nebraska to impose a State tax on the income earned by Indians working and residing on reservations in the State is of great concern to NTCA and the tribes represented by its members. The NTCA joins and fully supports petitioners in asserting that the decision of the lower court was erroneous on its legal merits.

In addition, the NTCA believes that the lower court's decision only adds to the mounting confusion already surrounding the issue of State taxing authority in Public Law 280 states and seriously undermines the federal and tribal goal of Indian self-determination. Since the Eighth Circuit's ruling in *Omaha Tribe* v. *Peters,* —— F.2d —— (1975), is the first federal appellate decision to clearly uphold the taxing authority of the States under Public Law 280, it will have a major impact on NTCA member tribes not only in States within the jurisdiction of the Eighth Circuit,

but in all of the thirteen States [1] presently having full or partial jurisdiction over reservations under Public Law 280. NTCA, therefore, urges the Court to grant the Writ of Certiorari sought by the Petitioners and to resolve the issue of State taxing authority under Public Law 280.

REASONS FOR GRANTING THE WRIT

I. Public Law 280 Was Not Intended To Be a Termination Statute. Thus a Construction of the Law Which Terminates the Historically Cherished Tribal Immunity From State Taxation Is Unwarranted and Unreasonably Discriminates Among Indian Tribes.

The Eighth Circuit interprets Public Law 280 as a grant to the state of Nebraska of civil jurisdiction so extensive as to fully terminate the immunity from state taxation which had historically been afforded Indian tribes and secured to them by recent decisions of this Court. *Omaha Tribe* v. *Peters,* —— F.2d —— (May 9, 1975), Slip op. at 7; *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. 164 (1973). Public Law 280, however, was never intended as the comprehensive act of termination which the lower court's decision suggests.

The Federal policy of terminating the trust relationship existing between the United States and the Indian tribes reached its ascendance in the early 1950's. In 1952, the House of Representatives, by resolution, ordered its Committee on Interior and Insular Affairs to investigate the Bureau of Indian Affairs and determine how that agency had evaluated the qualifications of Indian groups and tribes to manage their own affairs without further Federal supervision. H.R.Res. 698, 82d Cong., 2d Sess. (1952). The House Interior Committee responded, recommending a policy of assimilation of Indians into the Nation's social and economic life. H.Rep.No. 2503, 82d Cong., 2d Sess., 124 (1952). Congress expressed this termination policy most concretely in 1953 in House Concurrent Resolution 108, 67 Stat. B132 (1953), which declared that Indians should be made subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, "*as rapidly as possible.*" But the termination resolution was more specific in its actual resolving provisions as it focused on certain states and tribes:

> [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. H.Con.Res. 108, 83d Cong., 1st Sess; 67 Stat. B132 (1953).

This resolution was passed August 1, 1953, while Public Law 280 was approved August 15, 1953. California is the only Public Law 280 state also scheduled for termination by the Concurrent Resolution of the House, while the Menominee Tribe was at the same time spe-

[1] The following states have full or partial jurisdiction over Indian reservations: Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Montana, Nebraska, Nevada, Oregon, Washington, Wisconsin.

cifically excepted from the statute's transfer of jurisdiction and scheduled for termination. The two enactments thus did not coincide. Public Law 280 may have relied to an extent on a philosophy of promoting assimilation, but the total severance of the Federal protective relationship contemplated by the policy of "termination" was very specific in nature and was reserved for those tribes who were ready for it. Thus, subsequent to 1953, Congress began to enact termination legislation applicable to specific tribes. 25 U.S.C. §§ 564, 677, 691, 721, 741, 791, 821, 841, 891, 971 (1970).

The history of Public Law 280 demonstrates that it derived its primary impetus from the need for law enforcement on the reservations. As early as 1948 a House Committee reporting on a criminal jurisdiction bill noted the lack of enforcement on the reservations of laws covering offenses committed by Indians. H. Rep.No. 1506, 80th Cong., 2d Sess. (1948). The report accompanying the bill which became Public Law 280 cited as one of the bill's two major purposes the remedying of "a hiatus in law enforcement authority" on many reservations. H.Rep.No. 848, 83rd Cong., 1st Sess. (1953). The second purpose described in the report was a more general expression of the desirability of having state courts adjudicate civil controversies arising on reservations and of extending "the substantive civil laws" of the states to those Indians who had reached an undefined "level of acculturation and development." *Id.* The report, however, clearly delineated as distinct areas of concern the enactment of legislation concerning termination of federal responsibility for administering tribal affairs and the enactment of legislation aimed at repeal of certain restrictive, discriminatory statutory provisions which set In-

dians apart from other citizens. *Id.* The question of state civil jurisdiction over Indians was one of several under consideration in the area of anti-discrimination legislation. *Id.*

The individual tribal termination acts were also specific in their disposition of the taxation issue. In language similar to Public Law 280, these acts stated, "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens." 25 U.S.C. §§ 564, 677, 703, 757, 803, 899, 980 (1970). Congress, however, did not believe these words were sufficient to resolve the problem of taxing authority because they added in each instance a proviso that "such property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians . . . ." 25 U.S.C. §§ 564J, 677p, 699, 749, 798, 898, 978 (1970).

Since Public Law 280 was not intended by Congress as a termination act, the interpretation given the law by the lower court here, in effect, arbitrarily creates two classes of recognized tribes under federal aegis: those that are subject to state taxation and those that continue to enjoy the immunity inherent in the sovereign and recognized by this Court in *McClanahan.* Those Indians who do not pay taxes to the states stand in a better financial position than those who do. Such disparities of taxation do not encourage the financial independence of individuals or tribes. The inequities inherent in this scheme of classified federal protection do not bode well for the future of the Indian people and it is, therefore, most urgent that this Court resolve the issues presented by petitioners.

II. Tribal Efforts Toward Self-Determination Are Undermined by the Direct Drain of Wealth from the Reservation in Taxes and by the Uncertainty of Tax Liability for Individual Indians and Tribal Economic Enterprises.

In the 1975 Indian Self-Determination and Education Assistance Act, Congress clearly expressed its commitment to "the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people." Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C.A. § 450a(b). Moreover, this Court recently affirmed its support and respect for the self-determination of reservation Indian tribes when it stated, "[I]t is nontheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations . . . as a separate people, with the power of regulating their internal and social relations, . . . thus far not brought under the laws of the Union or of the State within whose limits they reside.' *United States* v. *Kagama,* 118 U.S., at 381-382, 6 S.Ct., at 1112." *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. at 173.

Public Law 280, however, has cast considerable doubt upon the scope of tribal sovereign power. Since this Court has never defined the effect of Public Law 280 on the taxing authority of the States and has expressly reserved judgment on the issue in *McClanahan* v. *State Tax Commission of Arizona,* 411 U.S. 164, 178 n. 18 (1973), the thirteen States possessing jurisdiction under the statute have been left to interpret the extent of their taxing powers over reservations within their

boundaries. These States have drawn the parameters of their taxing authority over the Indians in different ways with inconsistent results. The Eighth Circuit's ruling here, while technically controlling only upon the courts within its jurisdiction, will serve as an invitation to States outside the Eighth Circuit to expand and redefine the reach of their taxing power over the tribes. The inevitable result is an unpredictable tax liability and financial chaos for the more than 100 tribes involved.

The confusion and chaotic taxing policies of the various States which exist now and which will increase as a result of the lower court's decision here, deeply undermine the federal policy favoring Indian self-determination. Self-determination depends in large measure on the development of strong tribal government and the economic development of reservation resources. Although the specific issue in *Omaha Tribe* v. *Peters* relates to the personal income tax imposed on individuals residing on and earning income on the reservation, the unresolved question of State taxing authority under Public Law 280 reaches many aspects of tribal existence and potential development.

Many tribes in the thirteen states directly affected by this decision are currently attempting to develop their economic resources and raise the standard of living of their people through the establishment of on-reservation tribal enterprises. A drain of tribal revenue to the State and the unpredictable tax liability for the corporate enterprise are major obstacles to comprehensive economic planning and development. Furthermore, Congress has recognized that a primary obstacle to Indian self-sufficiency is the near total lack of economic community on many reservations and the finan-

cial inability to develop resources. H.Rep.No. 907, 93rd Cong., 2d Sess. (1974). The potential for extensive State taxation of tribal enterprises compounds these existing problems and frustrates Indian aspirations for the future.

The financial burden which the States may impose upon individual Indians and on-reservation Indian businesses should not be underestimated. Public Law 280 states are located in the Bureau of Census's North Central, West and Alaska regions. According to the 1970 Census,[2] the annual per capita income of the rural Indian population of the North Central region was between $1,122 and $1,132; 35.8 percent of all Indian people in the region had incomes less than the federal poverty level. Of all rural Indian families in the region, 42.2 percent had incomes below the poverty level. In the West, the per capita income of rural Indians was between $1,023 and $1,063. Nearly 42 percent of all Indians and over 50 percent of all rural Indians earned incomes below the poverty level; and the income of 48.5 percent of all rural Indian families was below the poverty level. The figures for Alaskan Indians are comparable with 35.1 percent of all rural families below the poverty level and a personal per capita income of $1,570 for rural peoples. In general, analysis of most traditional indicators show the Indian people to be at the bottom of this country's economic scale and this is especially true in the western and northern states. *See* H. Rep.No. 907, 93rd Cong., 2d Sess., 2 U.S. Code Cong. and Admin. News 2874 (1974). State taxation will thus weigh heavily on many individ-

[2] All data from: U. S. Bureau of the Census, *Census of Population: 1970, Subject Reports, Final Report PC(2)-1F, American Indians.*

uals who already lead an impoverished existence and should not, therefore, be imposed without a full review of state taxing authority by this Court.

III. CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals in *Omaha Tribe* v. *Peters* should be granted.

Respectfully submitted,

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vs.

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Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

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BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC. IN SUPPORT OF THE PETITION FOR CERTIORARI

This brief is filed with the consent of both parties.

The National Congress of American Indians, Inc. (NCAI), is a nonprofit association of most of the Indian tribes of this country. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1430 K Street, N.W., Washington, D.C. The decision below, if allowed to stand, will seriously affect many of NCAI's members.

The decision below holds that Public Law 280, 28 U.S.C. § 1360, empowers states to tax reservation Indians without their consent. This is a holding of fundamental impact on many tribes in 13 states, and a major infringe-

ment of tribal freedom from state interference. We urge this Court to grant certiorari.

Pursuant to Public Law 280, some 13 states presently have full or partial jurisdiction over some or all Indian reservations in those states: [1]

Alaska	Idaho	Nevada
Arizona	Iowa	Oregon
California	Minnesota	Washington
Florida	Montana	Wisconsin
	Nebraska	

Public Law 280 by any fair reading *on its face* applies only to criminal law, not relevant here, and *private civil law*—divorce, contract, and the like. Nowhere does it grant the state the sovereign powers, such as the power to tax Indians, that the state claims here.

Public Law 280's preamble (67 Stat. 588) says that it is—

> "an Act to confer jurisdiction on [certain states] with respect to criminal offenses and *civil causes of action* committed or arising on Indian reservations . . . ." (Emphasis added)

By no fair reading can this language be stretched to grant to the states the power to tax Indians.

Public Law 280 covers civil jurisdiction in Sec. 4 (28 U.S.C. § 1360(a)) the operative language of which is:

> "[Certain states] shall have jurisdiction over *civil causes of action between Indians or to which Indians are parties* . . . ." (Emphasis added)

This is certainly no basis for state taxing power.

Sec. 4 (28 U.S.C. § 1360(a)) goes on to say:

[1] In addition, Iowa, Kansas and New York exercise some jurisdiction by special statutes not relevant here. See tabulation at 78 I.D. 24 (1972).

> ". . . those civil laws of such State that are of general application to *private* persons or *private* property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . ." (Emphasis added)

If this last clause stood alone, without the two preceding quoted clauses, it could be argued, at least (though we would still find it strained), that "civil laws of general application to private persons and private property" does include laws declaring or implementing state sovereign powers, such as tax laws. But the two preceding quoted clauses make it clear that Congress was thinking of the more limited (and in the context more natural) concept of the laws governing private relationships. To say that Congress intended this language to grant major sovereign powers to the state, such as the *taxing* power, is simply impermissible, in view of the preceding quoted clauses, and should be rejected out of hand.

If the holding of the court below is allowed to stand, it may confidently be predicted that many Public Law 280 states will take the position that they have full sovereignty over Indian reservations, except over federal trust property, and will claim the right to zone reservation land; to license tribal businesses; to grant franchises on the reservation; to tell the tribes what air and water standards to adhere to, and so forth.

If the holding below is not reviewed, tribes which are striving to build modern, self-governing communities will face serious delays, litigation costs, and uncertainties in knowing what tribal powers survive Public Law 280, and to what extent the tribes must defer to state sovereignty. It is inevitable that this great issue will interfere with tribal progress until this Court settles it. The sooner the Court settles it the sooner the tribes and the Public Law 280 states will know what the future shape of their relationship will be.

Wherefore, certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-169

OMAHA TRIBE OF INDIANS, ET AL., *Petitioners,*

v.

WILLIAM A. PETERS, ET AL., *Respondents.*

Brief of
Bad River Band of Lake Superior Chippewa Indians of Wisconsin, Inc.; Bishop Indian Tribal Council; Confederated Tribes and Bands of the Yakima Indian Nation; Confederated Tribes of the Colville Reservation; Confederated Tribes of the Umatilla Indian Reservation; Covelo Indian Community of the Round Valley Reservation; Forest County Potawatomi Community of Wisconsin, Inc.; Hoh River Indian Tribe; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Inc.; Lac Du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, Inc.; Lower Elwha Tribal Community; Lummi Indian Tribe; Makah Indian Tribe; Metlakatla Indian Community; Muckleshoot Indian Tribe; Nisqually Indian Tribe; Nooksack Indian Tribe; Oneida Tribe of Indians of Wisconsin, Inc.; Owens Valley Paiute Shoshone Band of Indians; Port Gamble Band of Clallam Indians; Puyallup Indian Tribe; Quechan Tribe; Quileute Indian Tribe; Quinault Indian Nation; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, Inc.; Sauk-Suiattle Indian Tribe; Shoalwater Indian Tribe; Sokaogon Chippewa Community of Wisconsin, Inc.; Squaxin Island Indian Tribe; St. Croix Chippewa Indians of Wisconsin; Stockbridge-Munsee Community of Wisconsin, Inc.; Suquamish Indian Tribe; Swinomish Tribal Community; Tulalip Tribes of Washington; and Wisconsin Winnebago Tribe, As Amici Curiae in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONSENT TO FILING OF BRIEF AMICI CURIAE

The consent of the attorneys representing both petitioners and respondents in this action to the filing of this brief *amici curiae* in support of the petition for writ of certiorari has been obtained.

INTERESTS OF AMICI CURIAE

Each of the *amici curiae* is an Indian tribe or tribal organization located in a state affected by the Act of August 15, 1953, commonly known as "Public Law 280."[1]

The Eighth Circuit Court of Appeals held below that Congress, by enacting P.L. 280, "exercised its constitutional power to allow Nebraska to impose taxes upon the income of reservation Indians earned on the reservation." *Omaha Tribe of Indians* v. *Peters*, — F.2d—(8th Cir. 1975) slip opinion p. 8. While this decision is technically controlling only upon the lower federal courts within the Eighth Circuit, it most certainly will have a direct and immediate impact upon reservations and tribes in all P.L. 280 states, for *Omaha Tribe* is the first decision of a federal appellate court squarely upholding the power of states to tax under P.L. 280.

Congress has recently confirmed "its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people."[2] Similarly, this Court in 1973 reiterated that "from the very first days of our Gov-

[1] P.L. 83-280, 67 Stat. 588; codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

[2] Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. § 450a(b) ("Indian Self-Determination and Education Assistance Act").

ernment, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference."[3] Accordingly, the interest of each of the Indian tribes which have joined in this brief is the preservation of their historical independence from state control, taxation and regulation, the maintenance of their trust relationship with the United States, and the nurturing of their own internal sovereignty and economic independence.

By joining in this *amicus* brief, the respective tribes —located within the States of Alaska, Washington, Oregon, California and Wisconsin—not only seek to advance their own interests as tribes, but also seek to protect the rights of their enrolled members who, as the following discussion will show, are being subjected to chaotic and conflicting state schemes for the taxation of reservation Indians.

Space limits do not permit each of the *amici* to set forth with particularity each instance in which a state has attempted to tax tribal activities or tribal members. Suffice to say that most, if not all, of the *amici* are attempting at present to achieve a measure of political and economic independence by establishing and operating on-reservation tribal enterprises. These enterprises provide employment for tribal members on Indian reservations, and—if they are to be successful—require that the status of their immunity from state taxation be clarified. Additionally, the imposition of state income and other taxes on reservation Indians diminishes or destroys the ability of tribal governments to levy their own taxes, thus preventing them from

[3] *McClanahan* v. *Arizona Tax Comm'n.*, 411 U.S. 164, 170 (1973), quoting from *Warren Trading Post Co.* v. *Arizona Tax Comm'n.*, 380 U.S. 685, 686-687 (1965).

generating the revenue necessary for successfully carrying out their own regulatory programs,[4] and discouraging the development of on-reservation business enterprises. If *amici* are to have any chance to raise the standard of living for their constituent members, a speedy recognition of the Indian tax immunity is essential.

Accordingly, each of the *amici* are affected—directly and adversely—by the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR ALLOWING THE WRIT

I.

Introduction

The narrow question presented by the Petition is whether, by enacting P.L. 280, Congress conferred upon Nebraska the jurisdiction necessary to tax incomes earned by enrolled tribal members within the boundaries of reservations in the State. *Amici* do not seek, by submission of this brief, to address themselves to the merits of the issue before the Court, since the Petition filed by the Omaha Tribe contains a well-reasoned analysis of the relevant law and legislative history. Rather, in urging this Court to grant the writ, they propose to show the confusion that now exists over state power, under P.L. 280, to tax on-reservation Indians; and to emphasize the direct and far-reaching

[4] Tribes have the power to tax property within reservation limits. 55 I.D. 14, 46 (1934); F. Cohen, *Handbook of Federal Indian Law* 266 (1941); University of New Mexico reprint).

importance of the instant litigation to all Indian tribes and their constitutent members, both now and in the years to come.

II.

ARGUMENT

A. Review Is Necessary Because of the Uncertainty that Now Exists Over the Power of States To Tax On-Reservation Indians Under Public Law 280.

This Court has never defined the effect, if any, of P.L. 280 upon the power of states to impose taxes upon reservation Indians. That question was reserved specifically in *McClanahan* v. *Arizona Tax Comm'n., supra.*[5]

Thus, nearly every state affected by the Act takes the position that P.L. 280 constitutes a general Congressional grant of taxing power over on-reservation Indians. And because this Court has never demarcated the limits of state jurisdiction conferred by P.L. 280, the states and their subdivisions differ significantly in setting limits upon their own taxing authority as assertedly derived from the Statute. While *amici* cannot now present to the Court a comprehensive catalog of all kinds of taxes being levied under the aegis of P.L. 280, they hope to highlight—by example—the confusion that now reigns among the states.

California has not promulgated a comprehensive policy respecting its P.L. 280 taxing power. Rather, tax questions have been settled by a variety of agencies on an *ad-hoc* basis. California generally imposes its personal income tax upon Indians who live and work within reservation boundaries, but exempts

[5] 411 U.S. at 178, footnote 18.

from taxation income directly derived from utilization of lands held in trust by the United States.[6] The State also imposes a head-day tax on the "privilege of grazing or tending livestock," but exempts Indian livestock grazed upon trust land within reservation boundaries.[7] Likewise, business inventories owned by Indians who operate on-reservation retail establishments are exempted from taxation,[8] and Indian-owned businesses located on trust land within California reservations are not required to collect the State's sales tax.[9] Finally, Indian-owned mobile homes located upon reservations are not subject to registration or vehicle license fees.[10]

Oregon construes its taxing power under P.L. 280 as more encompassing than does California. The Ore-

[6] Cal. Rev. & Tax. Code § 17041; 18 Cal. Admin. Code, Reg. § 17071(p).

[7] Cal. Rev. & Tax. Code § 5521. By letter dated August 6, 1973 from John H. Knowles, Tax Counsel, State Board of Equalization, to the Mendocino County Assessor, the Board ruled that Indian-owned cattle grazed on trust land could not be taxed.

[8] *County of Humboldt* v. *Pearson, Action* No. 52040 (Superior Court of Cal., County of Humboldt, August 24, 1972). The Court dismissed an action by the County to collect a business inventory tax from an Indian business located on the Hoopa Valley Reservation. The dismissal was not appealed. The business inventory tax is authorized by Cal. Rev. & Tax. Code §§ 201, 219.

[9] Letter of May 1, 1970 from J. Kenneth McManigal, Tax Counsel, State Board of Equalization, to Office of the Solicitor, U. S. Department of the Interior. The exemption from sales does not appear limited to sales between Indians.

[10] Department of Motor Vehicles, Manual § 2.140, *et seq.* (Supp. #39, August 16, 1974). The regulation does not distinguish between trust and fee land, so long as the trailer is Indian-owned and located within a reservation.

gon Attorney General, relying on *Omaha Tribe, supra,* has ruled that the State is entitled to levy its personal income tax upon incomes of Indians of the Umatilla Reservation which are "derived from sources within [its] boundaries."[11] However, the ruling fails to distinguish in any way between incomes earned from on-reservation employment, and incomes derived from the utilization of trust lands (e.g., income from sale of cattle).

Washington State—in contrast to California and Oregon—conceives its authority to tax reservation Indians and tribes to be virtually without limitation. Shortly after the rendition by that State's Supreme Court of a judgment in *Tonasket* v. *State of Washington* ("*Tonasket II*"), 84 Wash. 2d 164, 525 P.2d 744 (1974), appeal dismissed 43 U.S. Law Week 3450 (1975), the Department of Revenue promulgated Revenue Rule 192. *Tonasket II* reaffirmed Washington's power to tax cigarette sales, but limited the power to situations where the sales are to non-Indians and do not exceed two cartons. Despite the *Tonasket* Court's observation that the case did not involve a tax upon "trust lands, personalty, inventory, gross receipts, or income,"[12] and despite the limited character of its holding, Rule 192 is a sweeping attempt at maximizing the tax liabilities of on-reservation tribes and Indians.

Rule 192 divides Washington's reservations into two categories. Type I (non-plenary) reservations are those over which the State claims only a limited juris-

[11] Letter of April 1, 1975, from Ted E. Barbera, Assistant Attorney General, to the Oregon Department of Revenue.

[12] 525 P. 2d at 754. Washington does not have a personal income tax.

diction under P.L. 280, which clearly does not include the power to tax. Type II (plenary) reservations are those over which the State claims the full extent of jurisdiction permitted by P.L. 280. Rule 192 imposes a "business and occupations tax" upon Indian-owned businesses on Type II reservations, and even on Type I reservations unless the Indians conduct business "on their own land." The Rule also imposes a tax upon the sale of "tangible personal property to Indians whether by Indians or others," except (a) where the seller makes delivery to a point within a Type I (non-plenary) reservation, and (b) where the Indian buyer is not a member of a tribe occupying a Type II (plenary) reservation. Sales to non-Indians are taxed on both Type I and Type II reservations. Finally, Rule 192 allows a tax upon the "use of tangible personal property" on both Type I and Type II reservations, excepting only the use of personalty by Indians from Type I reservations.

Accordingly, revenues originating on Washington reservations are now threatened by a broad and confusing state tax scheme, which misconstrues the jurisdictional import of P.L. 280, attempts to tax the activities and non-trust properties of *tribes*[13] (as opposed to individual Indians), and makes no exception for personal property directly used in the development or economic utilization of trust land.[14] The State even

[13] P.L. 280 only purports by its own terms to confer jurisdiction over "Indians," and does not mention "tribes."

[14] Several actions are pending which broadly challenge Washington's taxation of Indians and tribes. *Confederated Tribes of the Colville Reservation, Lummi Indian Tribe and Makah Indian Tribe* v. *State of Washington*, Civ. No. 74-3868 (E.D. Wash.) (3 judge court); *Quileute Indian Tribe, et al.* v. *State of Washington*, No. C74-761S (W.D. Wash., 1974).

goes so far as to attempt the taxation of building materials located on reservations and being used by tribes for the construction of low-income housing under the HUD "Turnkey" program. Washington's tax scheme thus contrasts with the California approach, which generally excepts from taxation such property and income as is directly connected to or resulting from the use of trust lands, and which does not even attempt to reach tribally-owned assets.[15]

Wisconsin imposes an income tax upon on-reservation Indian incomes, a sales tax upon on-reservation sales by Indians, and a tax upon Indian-owned personalty located within reservation boundaries.[16] In contrast to California, Minnesota imposes a personal property tax upon on-reservation Indian mobile homes,[17] and upon conventional homes affixed to trust land.

In this summary of state tax activities, *amici* have sought to show how chaotic the field of Indian taxation is in P.L. 280 states. They find it difficult to believe that Congress could have intended such a haphazard and rag-tag result through its reference in the Act to civil laws "of general application to private persons or private property."

Should this Court review the judgment of the Eighth Circuit in the instant case (as *amici* hope it will), its decision inevitably will settle many doubts which have

[15] *Amici*, by pointing out these distinctions, do not concede that California has the power to tax incomes of any kind earned by on-reservation Indians.

[16] The legality of the Wisconsin on-reservation income tax is under challenge in *Wildcat* v. *Adamany*, No. 74-C-226 (W.D. Wisc.).

[17] *Bryan* v. *Itasca County, Minnesota*, — Minn. —, 228 N.W. 2d 249 (1975), petition for certiorari filed July 7, 1975 (No. 75-5027).

arisen, since enactment of P.L. 280, over the power of states to tax a wide variety of on-reservation Indian activities and properties. If the Court holds that P.L. 280 was not intended to confer upon the affected states a taxing authority greater than that already existing prior to its enactment, all reservations in P.L. 280 states will, of necessity, be exempt from state tax laws except those authorized by federal laws other than P.L. 280.

If, on the other hand, this Court denies review, the decision below will stand as the only authority at the federal appellate level dealing with the tax implications of P.L. 280. Inevitably, *Omaha Tribe* will be seen by the states as a *carte blanche* to continue and increase dramatically their Indian taxation. *Amici* fear that new and chaotic state tax rulings and lower court decisions will follow upon the Eighth Circuit's judgment in *Omaha Tribe,* and will impose upon them the burden and expense of protecting their immunity from taxation through constant litigation. It is therefore in the public interest and in the interest of the tribes in all P.L. 280 states that the quesions presented by the instant case be resolved by the United States Supreme Court.

B. Unless Reviewed, the Decision Below Will Have an Adverse, Widespread and Long-Lasting Impact Upon Tribal Economic Development and Self-Determination.

It is difficult for the tribes who have joined in this brief as friends of the Court to express fully their consternation with the Eighth Circuit's decision in *Omaha Tribe.* As stated by the House Committee on Interior and Insular Affairs in its report on the Indian Financing Act of 1974,[18]

[18] Act of April 12, 1974, P.L. 93-262, 88 Stat. 77.

> One of the most serious problems on the Indian reservations is the inadequate availability of financial resources to permit the Indian people to develop their own resources and potential. All the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today, there is almost a total lack of an economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be provided or facilitated.[19]

The decision below, in allowing on-reservation income taxation, and in encouraging states to levy other forms of taxation upon tribes, Indians, and Indian enterprises, raises a new and formidable hurdle to the accomplishment of the goal so recently enunciated by Congress in the Indian Financing Act: "to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources . . . ,"[20] for it now appears that an ever-growing percentage of funds appropriated by Congress for Indian businesses will be sidetracked into the coffers of state taxing authorities.

For the first time, many of the *amici* are operating business enterprises designed to take advantage of the natural resources at their disposal, and thereby to raise the standard of living of their constituent members.

[19] H. Rep. No. 93-907 (to accompany H.R. 6371), 93rd Cong., 2d Sess. (March 13, 1974), 2 U.S. Code Cong. & Admin. News 2874 (1974).

[20] §2, Indian Financing Act of 1974.

For example, several tribes in Washington are now operating modern fish processing plants which provide employment to low-income Indians and which promise —but for the threat of increased state taxation—to allow for a measure of tribal economic growth and self-determination. The Bishop Indian Tribal Council operates a tribal crafts store on the Bishop Reservation in California. The Quechan Tribe of the Fort Yuma Reservation, located on the Colorado River, owns and runs a hydroponic tomato farm. The Confederated Tribes of the Colville Reservation own and operate a supermarket called The Trading Post, the purpose of which is to provide food to reservation Indians at the lowest possible cost.[21] The St. Croix Chippewa tribe owns and operates the Black Dirt Corporation, an on-reservation construction enterprise.[22] A number of tribes are attempting to capitalize upon the remote and beautiful locations of their reservations by establishing tribally-owned resorts.

In addition to tribally owned and operated businesses, individual Indians are running on-reservation businesses which, to the extent that they are taxed by the states, are hindered in providing employment to tribal members.

Many reservations have within their boundaries federally-funded projects which also provide employment

[21] Washington is attempting to impose its business and occupations tax on this tribally-owned enterprise, which is located on trust land. In addition, the State seeks to levy its sales tax on sales by The Trading Post to Indians.

[22] Wisconsin has levied a personal property tax on the construction machinery owned by Black Dirt Corporation, even though it is used solely on the reservation.

to tribal members, thereby raising the standard of living for the entire reservation populations. The Round Valley Reservation in California, for example, is constructing an Indian health clinic with Hill-Burton funds which will employ members of the Covelo Indian Community on the Reservation. The Bureau of Indian Affairs frequently has on-reservation facilities employing Indians. Many reservations have obtained, or are applying for, federal housing monies for tribally-operated housing authorities which will employ reservation Indians.

Tribes, as independent political entities, have the power to levy their own taxes upon on-reservation incomes and businesses.[23] To the extent that states are empowered to tax these same enterprises, the tribal taxing power is destroyed *pro tanto*. A dual system of taxation is not a political reality, for it will discourage the location of new businesses upon Indian reservations. If tribes are ever to exercise their inherent powers of self-government, they must be free to control taxation within their boundaries, and to use tax revenues for their own governmental purposes. The decision below paves the way for state strangulation of tribal sovereignty through taxation. Unless *amici* are freed from attempts by the states to tax their enterprises and members, they will be reduced to little

[23] For example, the Quileute, Makah and Lummi Tribes derive substantial revenues from the levy of a business and occupations tax. The Quinault Indian Nation levies a tax upon the privilege of purchasing clams from tribal members, and the revenues from this tax are used to pay for a tribal program of fish and game control. Tribes organized under the Wheeler-Howard Act of 1934 (48 Stat. 984) generally have their taxing authority set forth in a constitution approved by the Secretary of the Interior.

more than social clubs—mere vestigial remnants of the "domestic dependent nations" that they were once regarded.[24] This result was not envisioned by Congress when it enacted P.L. 280.

III.

CONCLUSION

Amici sincerely fear that the decision below will be seen by the states and their local subdivisions as a strong precedent authorizing the invasion of on-reservation Indian resources, and the destruction through aggressive taxation of tribal powers of self-government. As beneficiaries of the special relationship existing between the United States and the Indian tribes, they believe that they are entitled to a definitive opinion from this Court as to the import of P.L. 280 on state taxation within Indian country. As this Court recognized in *McClanahan, supra,* "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[25] The states must be told where the limits to their taxing power lie if that policy is to have any concrete meaning. Continued uncertainty in the field of Indian taxation surely will frustrate the growth of tribal independence and economic stability which the *amici* fervently wish to promote.

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[24] *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[25] 411 U.S. at 168; quoting from *Rice* v. *Olson*, 324 U.S. 786, 789 (1945).

For these reasons, *amici* pray that this Court allow the writ and review the decision of the Eighth Circuit in *Omaha Tribe of Indians* v. *Peters*.

Dated: August 18, 1975.

Respectfully submitted,

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